SFOG Acquisition Company, LLC d/b/a Six Flags/White Water & American Adventures *and* Southeastern Carpenters Regional Council. Case 10–RC–15155

March 19, 2001

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On November 29, 2000, the Board granted the Employer's request for review of the Regional Director's Decision and Direction of Election solely with respect to whether the Regional Director properly included the "regular part-time/seasonal" employees in the unit found appropriate and whether the Regional Director properly ordered an immediate election.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the record, we affirm the Regional Director's decision (relevant portions are attached as an appendix) for the reasons set forth below.

The Employer operates Whitewater and American Adventures amusement parks at its Marietta, Georgia location. Whitewater operates from May 6 through September 4; American Adventures operates year-round. A single maintenance staff maintains both facilities, which are connected. On Whitewater's May 6 opening date in 2000, the Employer had at least nine maintenance employees on staff, most of whom had worked during the preseason startup period.

The Petitioner seeks to represent a unit of the Employer's maintenance employees at its American Adventures/Whitewater facilities. The Employer's maintenance staff consists of "benefited" and "nonbenefited" employees.[2] The Employer contends that the "non-benefited" employees are seasonal employees and do not have any expectation of working beyond Whitewater's September 4, 2000 closing date and therefore should not be found eligible to vote.[3] The Petitioner contends that the "non-benefited" employees, regardless of the Employer's characterization of them as "seasonals," are in fact regular year-round employees who are eligible.

The Regional Director found that those maintenance employees classified as "seasonal" are more akin to regular part-time employees and included them in the unit.[4] The evidence shows that at the time of the hearings in this case, seven nonbenefited maintenance employees were employed by the Employer.[5]

During the hearing, the Employer asserted that it was going to lay off the "non-benefited" employees by early October. The Regional Director in his Decision of November 1, 2000, found that the Employer's allegations regarding a pending layoff were speculative. In its request for review, the Employer alleges that on November 6, 2000, it laid-off the "non-benefited" employees, retaining the two full-time "benefited" employees on its maintenance staff.

Assuming that the "non-benefited" employees were laid off before the election, we find that the layoffs did not render them ineligible to vote because those employees had a reasonable expectation of reemployment. Thus, the Employer did not tell the "non-benefited" employees when they were hired that their employment was temporary or that it would end at any particular time.[6] To the contrary, at the hearing, the Employer's director of maintenance testified that the Employer's policy is to mark laid-off "seasonal" employees as eligible for rehire if their work is satisfactory. Further, "non-benefited" employee Moss testified that when he was laid-off during the summer he was told that he was eligible for rehire.

Under these circumstances, we find that the Employer intends to give preference in rehiring to its laid-off employees and that the laid-off "non-benefited" employees have a reasonable expectation of reemployment. Accordingly, we find that they are eligible to vote. *Sol-Jack Co.*, 286 NLRB 1173 (1987).

In light of this finding, a substantial number of employees are eligible to vote in the election, although the peak of operations has passed. We therefore affirm the Regional Director's decision to order an immediate election.

ORDER

The Regional Director's Decision and Direction of Election is affirmed. This proceeding is remanded to the Regional Director for further appropriate action.

MEMBER HURTGEN, dissenting.

I do not agree that the laid-off "non-benefited" employees had a reasonable expectation of recall. Accordingly, I disagree that they were eligible to vote.

[1] In all other respects, the Board denied the request for review.

[2] "Benefited" employees receive such benefits as 401(k) plans, flexible spending accounts, medical and dental insurance, vacation and sick leave pay. "Non-benefited" employees do not get these benefits.

[3] The election was held on December 1, 2000, and the ballots impounded.

[4] Between the first hearing on August 14, 2000, and the second hearing on September 20, 2000, the Employer reduced the hours of its maintenance staff. "Non-benefited employees" were reduced from 40 or more hours to 24 hours per week.

[5] During the summer the Employer terminated one "non-benefited" employee for attendance problems and laid-off one "non-benefited" employee for budgetary reasons. The Regional Director dismissed unfair labor practice charges based on these separations.

[6] Indeed, the maintenance employees testified that they were told that seasonal employees would work year round.

The Employer operates an amusement park, and the "Whitewater" portion of it runs from May to September. At the hearings herein held in August and September, the Employer asserted that it would lay off "non-benefited" employees at the end of the season.[1]

My colleagues do not dispute the Employer's assertion that these employees were in fact laid off on November 6. However, my colleagues find that they had "a reasonable expectation of re-employment." There is insufficient evidence to support this critical finding. The only evidence relied on to support this finding is the testimony that the laid-off employees were told that they were *eligible* for rehire next season if their work was satisfactory this season. From this slender reed, my colleagues infer that these employees would enjoy a "preference" for hiring next season, and that there was a reasonable expectation that they would be hired. Surely, this is a non-sequitur. The fact that a person is *eligible* for rehire is not the same as saying that a person will be *preferred* for rehire. The Employer herein was simply drawing a distinction between those who are not eligible (because their work was unsatisfactory), and those who would be eligible. As to the former group, they will not be rehired. As to the latter group, they may be rehired, i.e. they can apply and will be considered. However, so far as this record shows, they enjoy no preference. Accordingly, I see no basis for letting them vote in the December election, i.e., after their layoff.

DECISION AND DIRECTION OF ELECTION

The Status of the Seasonal Maintenance Employees:

The Employer submits that, in the event a separate maintenance unit is found appropriate, the unit should not include the "seasonal" maintenance employees because they do not have a "reasonable expectation of re-employment." The Employer further asserts that if the "seasonal" employees do have a reasonable expectation of recall, they should nevertheless be excluded from a unit of full-time maintenance employees because they do not share a sufficient community of interest with the full-time maintenance employees.

The Employer's evidence in support of its position on the recall issue rests primarily on the testimony of Director of Maintenance Ron Ebert.[1] Ebert testified that the "seasonal" maintenance employees do not, or at least should not, have any expectation of working beyond September 4, 2000, at the Whitewater Park. Ebert further testified that the Employer's budget "shows seasonal scheduled and budgeted through the end of October and there will be no seasonals [in] November and December."

Ebert's testimony conflicts with testimony of employee witnesses. The unrebutted testimony of approximately 10 out of the 11 maintenance employees in the requested bargaining unit supports a finding that both full-time and "seasonal" maintenance employees work a year round schedule. For example, maintenance employee Jim Thompson testified that "seasonal" workers are not laid off at the end of the season but continue to work, and that maintenance work is performed year round by both full-time and "seasonal" part-time employees. Maintenance employee Charles Carnes testified that Ebert informed him that he would continue working year round even after Carnes' status changed from full-time to "seasonal" in April 2000.[2] Carnes further testified that he averages "anywhere from forty to sixty" hours a week. "Seasonal" employee Tommy King was told by supervisors Puckett and Wilson that the maintenance job was a "full-time year round job" and that King would "work more in the winter time than . . . when the park's open." Full-time maintenance employee Kenneth Kemp testified that within the last 2 months Supervisor Andy Wilson told him that the Employer intended to work the "seasonal" maintenance employees year round.

The foregoing testimony is consistent with the general experience and testimony of all maintenance employees employed by the Employer at the Whitewater/American Adventures parks. Given the uncontradicted employee testimony, coupled with the speculative nature of Manager Ebert's testimony regarding any impending layoff, I find that those maintenance employees classified as "seasonal" are, in fact, more akin to regular part-time employees. Accordingly, I shall include the "seasonal" regular part-time maintenance employees in the unit.

The record evidence also does not support the Employer's assertion that the "seasonal" maintenance employees do not share a community of interest with the full-time maintenance employees.[3] As previously noted, all maintenance employees perform essentially the same work. All maintenance employees transfer between Whitewater and American Adventures to cover maintenance work on an "as needed" basis and are cross-trained in various maintenance functions. Both classifications work off the same posted schedule, share common supervision, and work approximately the same number of hours. There is no meaningful distinction between the type and location of work, work schedules, or hours of work between full-time and "seasonal" regular part-time maintenance employees. The record establishes that the "seasonal" regular part-time maintenance employees share a substantial community of interest with

[1] The "non-benefited" employees do not receive certain benefits (e.g., insurance, 401(k) plan).

[1] The testimony of Human Resources Manager Debbie McGraw on this issue was of little or no probative value as her testimony related to all seasonal employees employed by the Employer, and was not limited specifically to the practice and experience of the maintenance department.

[2] Significantly, Carnes' rate of pay, line of supervision, and job duties remained the same after his change in status.

[3] Although the Employer's "seasonal" maintenance employees are not entitled to participate in the various fringe benefit programs provided to its full-time maintenance employees, such disparity does not, by itself, support excluding the "seasonal" maintenance employees from the unit. *Western Temporary Services*, 278 NLRB 469 (1986), enfd. 821 F.2d 1258 (7th Cir. 1987); *Quigley Industries,* 180 NLRB 486 (1969).

those maintenance employees classified as full time, and are therefore appropriately included in the unit.[4]

Accordingly, based on the record evidence, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time (seasonal) maintenance employees employed by the Employer at its Whitewater and American Adventures Marietta, Georgia amusement parks, but excluding all office clerical employees, guards, and supervisors as defined in the Act.

[4] Assuming arguendo, that the seasonal maintenance employees were not found to be regular part time employees, I find, given the testimony of the maintenance employees, that said seasonal employees have a reasonable expectation of recall after the end of the season and thus would be appropriately included in the bargaining unit.